terest in his uncle's real estate as he would have taken if his mother had survived her brother. In many other States having statutes substantially the same as the Virginia statute—and none others need be considered—like rulings have been made. *Briggs* v. *Greene*, 10 R. I. 495; *McGuire* v. *Brown*, 41 Iowa, 650; *Gregley* v. *Jackson*, 38 Ark. 487; *Butler* v. *Land Co.*, 84 Ala. 384, 4 South. 675. And under the rulings of the Supreme Court of the State of Connecticut on the general statutes of descents of that State, in which no such provision for this class of persons is made, it is held that illegitimate children may inherit to the mother, or to any relative lineal or collateral on the mother's side. *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 553; *Heath* v. *White*, 5 Conn. 228; *Brown* v. *Dye*, 2 Root. 280.

"There is perhaps, however, not a State in the Union in which a statute of a similar character has not been enacted to relieve a class of beings who, under the harsh maxims of the common law, were made to bear the iniquities of their parents. 24 Am. & Eng. Enc. Law, 414; Schouler, Dom. Rel., sec. 277; 2 Kent Comm., sec. 209. This legislation, in the language of Chancellor Kent, 'rests upon the principle that the relation of parent and child, which exists in this unhappy case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity.'"

As to whether the Virginia statute referred to repeals the common law rule expressed in the maxim *qui ex damnato coitu nascuntur, inter liberos non computentur*, see 5 Va. Law Reg. 111. In *Bennett* v. *Toler*, 15 Gratt. 588, it was held that such is the effect, but a contrary view is taken in *Johnstone* v. *Taliaferro* (Ga.), 32 S. E. 931, distinguishing the Virginia case.

How Far May the Legislature Legalize What Would Otherwise be a Nuisance.—In *Georgia R. R. & Banking Co.* v. *Maddox* (Ga.), 42 S. E. 315, it was held that the operation of a railroad terminal yard, located and operated by legislative authority, and conducted in a proper manner, cannot be enjoined as a nuisance by neighboring property owners, though the operating of the yard seriously interferes with the comfort of adjoining proprietors by reason of the noise, vibration, smoke and cinders. The court said in part:

"From what we have said above, it is seen that the terminal yard, the operation of which the defendants in error seek to enjoin, was located, and its construction authorized, under statutory powers. In such cases the general rule, supported practically by an almost unbroken line of authorities, is that a work so located and constructed, if constructed and operated in a proper manner, cannot be adjudged a nuisance. This applies with special force to works thus authorized to facilitate transportation on railroads, which are of a quasi public nature. 19 Am. & Eng. Enc. Law (1st ed.) 923, 924, and notes; 4 Wait, Act. & Def. p. 784; 2 Elliott, R. R., sec. 718, and note; 1 Wood R. R., sec. 212; 2 Wood, Nuis., sec. 753; 1 High, Inj. (3d ed.), sec. 767; *Vason* v. *Railroad Co.*, 42 Ga. 631; *Burrus* v. *City of Columbus*, 105 Ga. 42, 31 S. E. 125; *Beideman* v. *Railroad Co.* (N. J. Ch.) 19 Atl. 731; *City of Leavenworth* v. *Douglass* (Kan. Sup.), 53 Pac. 123; *Attorney General* v. *Railroad Co.*, 24 N. J. Eq. 49; *Hinchman* v. *Railroad Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Watson* v. *Railway Co.* (W. Va.), 39 S. E. 193. See, also, *Bacon* v. *Walker*, 77 Ga. 336; *Railroad Co.* v. *Cox*, 93 Ga. 564, 20 S. E. 68; *Long* v. *City of Elberton*, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363.

"From this rule, it follows that injuries and inconveniences to persons residing near such works from noises of locomotives, rumbling of cars, vibrations

produced thereby, and smoke, cinders, and soot, and the like, which result from the ordinary and necessary, and therefore proper, use and conduct of such works, are not nuisances, but are the necessary concomitants of the franchises granted. *Austin* v. *Railroad Co.*, 108 Ga. 687-689, 34 S. E. 852, 47 L. R. A. 755; Wood, R. R. p. 722; *Whitney* v. *Railroad Co.*, 69 Me, 208; *Beseman* v. *Railroad Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Costigan* v. *Railroad Co.*, 54 N J. Law, 233, 23 Atl. 810; *Railroad Co.* v. *Speer*, 50 Pa. 325, 94 Am. Dec. 84. We think these rules are based upon the soundest reason, and are clearly distinguishable from cases like that of *Baltimore & P. R. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, where railroads erect engine houses, coaling stations, or workshops, on their rights of way, from which the emission of ordinary noises, smoke, soot, and cinders may be a nuisance to owners and residents of abutting property, like other cases of lawful business not partaking of a public nature, and not having legislative sanction. See *Sawyer* v. *Davis* (Mass.), 49 Am. Rep. 27; *Romer* v. *Railroad Co.* (Minn.), 77 N. W. 825, 74 Am. St. Rep. 455. To make such rules uncertain is to invite a mass of litigation, and clog the wheels of commerce.

"The contention of the defendants in error that this terminal yard of switches and side tracks is a nuisance at Inman Park because dwellings were erected there before the construction of the yard, and it could have been located at another point, where there were no residences, without being a nuisance to anyone, is without modern legal precedent to sustain it, and is unsound for at least two reasons. In the first place, the terminal yard was located at the terminus of one railroad, on an existing right of way of another railroad, and under statutory power. We have adverted in paragraph 1 of this opinion to the power of the Atlanta Belt Line Company to locate its eastern terminus on the Georgia Railroad at or near Inman Park, and to the defendants in error being remediless to change that location after the work was completed, even if they had any right to stop the work at all. We also referred to the power of that railroad company to acquire, by lease, land for its necessary facilities, at such eastern terminus. It had the power to put in all the side tracks it needed, and side tracks cannot be put in without switches. 'A power to build side tracks is essential to the purpose and use of the road. A power to build a railroad of a single track, without the means of passing the trains or of leaving the track for the shifting of cars, and without standing room for the cars not in motion, would be clearly wanting in all that is necessary to safety, convenience, and utility, and would be vain and nugatory. . . . A switch is but a mechanical contrivance or movable opening to pass cars from one track to another. . . . The spot where the openings in the main track should be placed falls within the absolute discretion of the company, and cannot be readjudged by a private citizen who lives along the line of the road.' *Railroad Co.* v. *Speer*, 56 Pa. 325, 94 Am. Dec. 84. In the second place, it is obvious, if the terminal yard is a nuisance because located near dwellings, that it would clearly be a nuisance wherever it might be put, even in the woods or in a field, as soon as the owners of the adjacent land built houses on their land; for the old rule, maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded. 16 Am. & Eng. Enc. Law (1st Ed.), 934; *Railroad Co.* v. *Woodruff*, 86 Ga. 94, 13 S. E. 156 (3); *People* v. *Detroit White Lead Works* (Mich.), 46 N. W. 735, 9 L. R. A. 722; 2 Wood, Nuis., sec. 574.

"While the rule above stated is undoubtedly correct in view of the authorities, it does not follow that railroad works authorized by statute cannot become nuisances by their improper construction, or by their negligent and improper use after a proper construction. 2 Wood, Nuis., 761; 19 Am. & Eng. Enc. Law (1st ed.) 925; 4 Wait, Act. & Def., p. 785. The reason is that such exceptions do not fall within the legislative grant. It is, therefore, correct, in such qualified cases, to hold railroad companies to an accountability; for the legislative power given to them to construct a work, which relieves them from all liability for the ordinary and necessary incidents flowing therefrom, though causing annoyance to others, does not invest them with an unbridled license to use their

own property as they please, without any consideration for, and to the great detriment of, the rights and property of others. Some of the instances under which it is generally held that a nuisance may arise from the improper conduct of a railroad work authorized by statute, and which points are involved in this case, are: (1) Using defective engines which scatter unnecessary quantities of sparks, cinders and smoke (*Austin* v. *Railway Co.*, *supra*); (2) the improper management of proper locomotives by using a greater amount of steam than is reasonably necessary, by which an unusually large number of sparks are emitted, in attempting to draw too heavy a load up grade (3 Elliott, R. R. sec. 12225); (3) the sounding of whistles, ringing of bells, and blowing off of steam, at improper times, and in an unnecessary manner (*Austin* v. *Railway Co.*, *supra*); (4) the running of trains or cars, or using locomotives, on Sundays, by which churches are rendered less valuable for the purposes to which they are devoted, and divine worship therein on such days is greatly and unreasonably disturbed from noises, smoke and cinders, not to speak of the like discomfort on these days to individuals residing at such points (3 Wood, R. R., pp. 1615, 1616; 4 Wait, Act. and Def., p. 758; *First Baptist Church* v. *Schenectady & T. R. R. Co.*, 5 Barb. 79)."

See further on the subject: *B. & P. R. R. Co.* v. *Reamy*, 42 Md. 127, where defendant was alleged to have injured plaintiff's house by the construction of a tunnel underneath it. The defendant pleaded *damnum absque injuria*, and that no right of recovery existed unless the power delegated had been illegally or negligently exercised. The court, however, by Alvey, C. J., overruled the contention, distinguishing the rights and liabilities of a municipal corporation, in the careful exercise of its right and power to grade, change and improve its streets, from those of a private corporation, in no wise connected with the municipal government and asserting the right to use the streets in an extraordinary manner for its own private purposes and profit. Said the court:

"Notwithstanding authority may have been obtained both from the city and State legislatures to make the extraordinary use of the street, yet that authority must be exercised at the peril of the party to whom it is delegated; and if any injury accrues to private property in the exercise of the power, the party producing it must be held liable."

See also *Garrett* v. *Lake Roland E. R. Co.*, 79 Md. 277, 24 L. R. A. 396; *Morton* v. *Mayor*, 140 N. Y. 207, 22 L. R. A. 241.

The rights of the abutting owners in such case doubtless depend in large measure on the phraseology of the constitutional provision regulating the taking of private property for public use. Where "taking or damaging" is prohibited without just compensation, it would seem that the ruling in the principal case cannot be sustained. Section 58 of the new Constitution of Virginia provides that the General Assembly "shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation." *Quaere:* Is this equivalent, in legal effect, to a provision that such property shall *not* be so taken or damaged?